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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING LLOYD'S POLICY NO. DB 6284,

Petitioners,

against

ADELE L. RAND,

Respondent.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,

Petitioners,

against

ADELE L. RAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Reasons for Granting the Writ and Question Presented 2

Statement of the Case 4

ARGUMENT:

POINT I—The present posture of the case is such that this Court should review the narrow question presented 9

POINT II—Under any sound canon of legal construction known to American jurisprudence, petitioners are entitled to judgment as a matter of law in this case 13

Conclusion 18

CASES CITED

Abrams v. Great American Ins. Co., 269 N. Y. 90, 92 (1935) 14

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 527 ..... 10, 13

Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58, 126 N. E. 260, 264 17

Green Bros. v. Northwestern Live Stock Insurance Co., 87 Iowa 358, 54 N. W. 349 15

Greenwich Bank v. Hartford Fire Ins. Co., 250 N. Y. 116 16

PAGE

Hanna v. Commercial Travelers Mut. Accident Ass'n, 197 N.Y.S. 396, 397, aff'd 236 N. Y. 571 15

Hartford Live Stock Insurance Co. v. Henning, 206 Ky. 9, 266 S. W. 912 15

Hooper v. Kaskaskia Live Stock Insurance Co., 201 Ill. App. 167 15

Hough v. Kaskaskia Live Stock Insurance Co., 230 Ill. App. 341 15

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 463 14

Johnson v. Travelers Ins. Co., 269 N. Y. 401, 405 14

Melcher v. Ocean Accident & Guarantee Corp., 226 N. Y. 51 .....16, 17

Neas v. Home F. & M. Co., 135 F. Supp. 205, 207 ... 14

Public Service Mutual Ins. Co. v. Lutz, N.Y.L.J. Oct. 13, 1961 13

Stecker v. American Home Fire Assur. Co., 299 N. Y. 1, 6 10

Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 235 N. Y. 338, 346 14

U. S. v. South-Eastern Underwriters Ass'n, 322 U. S. 533 9

VanValkenburg v. Granite Live Stock Insurance Co., 205 Ill. App. 28 15

Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 307 (1925) 14

Vernes Credit Jewelry v. Fireman's Fund Ins. Co., 185 F. 2d 142 12

PAGE

Whiteside v. North American Accident Ins. Co., 200 N. Y. 320, 322, 323, 324 15

Woods Patchogue Corp. v. Franklin Nat'l Ins. Co., 5 N. Y. 2d 479 12

Zauderer v. Cont. Cas. Co., 140 F. 2d 211, 214 ..... 12, 13

STATUTES CITED

New York Insurance Law § 168 11

New York Insurance Law § 167 11

New York Insurance Law § 46 11

INDEX TO APPENDIX

Opinion of United States Court of Appeals, Second Circuit 1b

Judgment 19b

Judgment 20b

Denial of Petition for Rehearing 21b

Order Denying Petition for Rehearing in Banc 22b

Order Denying Petition for Rehearing 23b

Copy of Decision in Public Service Mutual Ins. Co. v. Lutz, Appearing in New York Law Journal, October 13, 1961 ..... 24b

IN THE

Supreme Court of the United States

UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING LLOYD'S POLICY NO. DB 6/234,

Petitioners,

against

ADELE L. RAND,

Respondent.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,

Petitioners,

against

ADELE L. RAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners, Underwriters at Lloyd's, London subscribing Lloyd's Policy No. DB6/234, The Guardian Assurance Company, Ltd., The Prudential Assurance Company, Ltd. and The United Scottish Insurance Company, Ltd., respectfully pray that a writ of certiorari issue to review the judgments of that Court entered on October 11, 1961 reversing judgments of the United States District Court for

the Southern District of New York for respondent upon a jury verdict (165a, 166a), and remanding the actions for a new trial. No further opinions were rendered.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported in 295 F. 2d 342. A copy thereof is set forth in the Appendix hereto, *infra*, pages 1b-18b.

Jurisdiction

The judgments of the Court of Appeals for the Second Circuit sought to be reviewed were entered on October 11, 1961. Copies thereof are set forth in the Appendix, *infra*, pages 19b, 20b.

On October 26, 1961, petitioners filed a petition for rehearing requesting *in banc* consideration. On November 9, 1961, the Court of Appeals for the Second Circuit denied a rehearing (Judge Hincks dissenting) (21b) and on the same date entered its orders with respect thereto (22b, 23b).

The Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254 (1), 28 U.S.C.A. § 1254 (1), confers on this Court jurisdiction to review the judgments.

Reasons for Granting the Writ and Question Presented

Petitioners are aware that this Court has not made a practice of concerning itself recently with matters of pure contractual law. Before adverting to the narrow and precise question presented, petitioners submit this case warrants deviation from said philosophy because:

1. The majority decision inevitably must affect the rights of parties who are engaged importantly in

foreign commerce. Petitioners are all British aliens who regularly issue Livestock insurance contracts to American citizens on a standard form, carefully drafted to express the conditions of their undertaking. This class of risk generates a premium in excess of $4,000,000 annually and the hazardous nature thereof dictates the necessity of conducting this foreign commerce on a uniform contract which will be enforced according to its plain meaning.

2. The result dictated by the majority can injure a broad segment of the American public by destroying the only important market for race horse mortality insurance. These alien insurers can no longer assume that their exposure will be measured by the obvious conditions of their undertaking.

3. The majority below has created a spurious jury question on indisputable facts which permit no inference other than vitiation of the contract, thereby creating a precedent for innumerable unnecessary jury trials on cases which should be decided summarily as a matter of law. Further calendar congestion is the probable consequence.

4. This untenable ruling can influence the interpretation of all types of insurance contracts, especially those issued by British and other alien insurers to American domiciliaries, thereby broadly extending the impact of the decision upon foreign commerce.

5. The majority explicitly recognizes that it is not bound by the law of New York on the question of whether this is a case for a jury because such a question is not one of substantive law. This decision thereby opens the door for submission of all of a host of such cases to juries in all federal courts throughout the United States. For this reason, the case presents a federal question of

direct concern to this Court, charged as it is with the power and duty of supervising the lower federal courts. (*U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 40.) Petitioners submit that for this reason, if no other, this Court should exercise its discretion to review this case.

6. The majority believes it is following the law of New York from which it is "unwilling to depart." It is flatly wrong on this point inasmuch as a unanimous Second Circuit speaking through Judge Learned Hand previously held: "Apparently it is true in New York, if all the facts are undisputed, that the Court will not leave to a jury, but will decide for itself, whether the delay has been unreasonable". (*Zauderer* v. *Cont. Cas. Co.*, 2 Cir., 140 F. 2d 211.) For this reason the majority is in conflict with its own ruling and the law of New York, if that is the law it is following. Such a condition merits review under Revised Rule 19(1)(b) of this Court.

The question for consideration by this Court is whether the majority of the United States Court of Appeals erred in not ruling on the uncontroverted facts herein that respondent did not comply with the notice provision of the livestock policies, thereby rendering her claim null and void and releasing petitioners according to the express terms of their contracts.

Statement of the Case

On April 8th, 1958, respondent instituted two separate actions in the United States District Court for the Southern District of New York to recover $38,000 for the death of her colt, Tom F. Jr. The jurisdiction of the Federal Court was invoked on the grounds of diversity of citizen-

ship and the fact that the matter in controversy exceeded $3,000 (4a-7a, 10a-12a).*

Petitioners, Underwriters at Lloyd's, London subscribing Lloyd's Policy No. DB6/234, provided livestock mortality insurance in the amount of $13,000 on respondent's colt. The other petitioners, The Guardian Assurance Co., Ltd., The Prudential Assurance Co., Ltd., and The United Scottish Insurance Co., Ltd., provided similar insurance, to a limit of $25,000.

Tom F. Jr., the subject of the insurance, was destroyed on November 2, 1957 (the day before the policies were to expire). Petitioners denied respondent's claim on the ground that respondent, her agents, employees, or servants failed to give immediate notice as required by the policies, whose terms are identical. Condition No. 4 of each policy, which deals with the requirement for giving notice, reads as follows:

> "In event of any illness, lameness, accident, injury or physical disability whatsoever of an insured animal the Assured shall immediately give notice * * * by telephone or telegram * * *. The Assured's failure to report the illness, lameness, accident, injury or physical disability as above provided * * * shall render Assured's claim null and void and release Insurers * * * from all liability in connection therewith."

In her complaints, respondent alleged that she had duly performed all the policy conditions. Petitioners alleged failure to comply with the aforementioned provision with respect to notice of "any illness, lameness * * * or physical disability whatsoever."

The evidence adduced at trial established the following indisputable facts:

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* References in parentheses where number is followed by "a" are to Joint Appendix in Record of Court of Appeals; all other references are to Appendix hereto.

The first notice given to petitioners of any injury or lameness to Tom F. Jr. was on September 4th, *1957* (39a).

On November 2nd, 1956, a veterinarian respondent hired, examined Tom F. Jr. (46a-47a, 179a), to ascertain if the colt was physically sound for insurance. He found Tom F. Jr. in excellent physical condition with no indication of lameness or faulty conformation in any of its legs (179a, 47a, 55a). Later in November of 1956, Tom F. Jr. was sent to Columbia, South Carolina with respondent's other horses to train during the winter (24a-25a, 36a) under the supervision of Stephens, respondent's trainer (23a, 36a, 85a). Stephens had been respondent's trainer for five years and had unlimited discretion with respect to her horses (24a, 85a, 103a).

On January 1st, 1957, Tom F. Jr. became a two-year old (23a) and some time that month, while at Columbia, South Carolina, Stephens noticed that Tom F. Jr. showed a "weakness" or "catch" behind (91a, 106a). Stephens immediately called Dr. Wright, a veterinarian, to examine the colt (93a). On January 29th, 1957, Dr. Wright examined Tom F. Jr. and found hind leg lameness (74a, 142a). He also X-rayed Tom F. Jr. (70a, 73a, 94a). The X-ray indicated a fracture of the fibula of the left leg, which Dr. Wright described as an injury (75a-76a, 95a, 104a, 107a).

The fibula is one of the bones which comprise the stifle of a horse (143a); the stifle is the true knee of a horse and is found only in the hind legs (52a, 58a-59a).

On the advice of Dr. Wright, Tom F. Jr. was taken off its training for thirty to forty days (76a-77a, 94a). Tom F. Jr. resumed training approximately one month later (107a). In late March of 1957, Tom F. Jr. and respondent's other horses were taken to Belmont Park in New York (90a, 96a). In early April of 1957, Stephens noticed that Tom F. Jr. showed a recurrence of a "catch" in the left hind leg (111a) and on the recommendation of Dr. Wright, the colt was returned to the Ward ranch (77a-78a, 97a).

Respondent was advised by Stephens that Tom F. Jr. was back in Kentucky (97a, 105a). By telephone, Stephens advised Mr. Ward of the previous injury and issued instructions to have Dr. Davidson examine the colt (97a, 103a, 104a, 109a). Upon its arrival, Tom F. Jr. was put under the supervision of Dr. Davidson (55a) who was advised by Ward of the colt's prior injury (56a).

On his first examination conducted on April 10th, 1957, Dr. Davidson noticed that Tom F. Jr. showed sensitivity in the left hind leg and that the animal favored that member (49a). Dr. Davidson's first X-rays of Tom F. Jr., taken in April of 1957, showed a separation of the tibial crest of the left hind leg, a condition frequently found with stifle injury (58a, 176a). These first X-rays also showed *a cloudy, suspicious area which Dr. Davidson was unable to diagnose* (57a, 58a, 66a).

At first, Tom F. Jr. seemed to improve; however, by July the lameness had not improved (58a, 176a). Additional X-rays of Tom F. Jr. were taken in July (50a, 176a). These showed the same condition as noticed earlier (50a, 58a). Dr. Davidson also re-examined the April X-rays and became suspicious of additional injuries to the joint proper because of the continued lameness and presence of the cloudy areas (50a, 53a, 58a, 176a).

During the period of July 20 to July 25, 1957, Stephens was in Lexington, Kentucky and was told by Ward that Tom F. Jr. had improved to a point and then no more (99a). Stephens testified that he was concerned at this point as "we gave a lot of money for him" (100a). Stephens' suggestion was that Dr. Davidson continue to look at Tom F. Jr. inasmuch as the horse was under his care (100a).

Aside from the telephone conversation when he advised Ward that Tom F. Jr. was being returned to the ranch, Stephens, at trial, didn't recall if he made any other telephone calls to Ward while Tom F. Jr. was at the ranch

from April onward (105a). However, in Stephens' opinion, Ward was a capable horseman in his own right (103a); in fact, Dr. Davidson's treatment of Tom F. Jr. was always handled through Ward who even had authority to approve Dr. Davidson's bills (55a, 104a-105a).

From July onward, Tom F. Jr.'s condition deteriorated (61a). During the summer months, the atrophy and displacement of the patella and the lameness gradually increased until it was evident that the colt would never recover and would be distressed as long as it lived (177a).

Stephens was again in Lexington on or about August 29, 1957 and, at this time, he was advised by Dr. Davidson that the colt "was getting worse all the time" (101a). In Dr. Davidson's words, Tom F. Jr. was "a three-legged horse" (54a).

At long last, despite the clear provision of the policies, petitioners were given notice on September 4th, 1957. *This was over seven months after the first X-ray* (70a, 73a, 94a).

In a report of a post-mortem examination he conducted on Tom F. Jr., Dr. Davidson stated as follows:

> "The patella had an area of cartilage erosion near the apex one and one-quarter by one-half inch in size. The medial condyle of the femur bone had a compression fracture across the dorsal third of the articular surface. The fracture healed leaving a depression through the articular surface.
>
> "The spine of the proximal end of the tibia showed evidence of previous injury as did the interosseous ligament which attaches to it.
>
> "The heavy muscles of the hip and leg on the affected side were markedly atrophied from disuse." (180a)

At the close of respondent's and their own case, petitioners moved for a directed verdict in their favor on the

ground that there was no issue of fact to be submitted to a jury for determination (139a, 143a). Both motions were denied (139a, 167a). The trial court then submitted the case to the jury (158a). The jury returned a verdict against petitioners on both policies. After the verdict, petitioners renewed their motion for a directed verdict (167a). This motion was also denied (167a).

Thereafter, petitioners appealed to the Court of Appeals for the Second Circuit contending that the District Court erred in refusing to direct a verdict for them and that, in any event, the verdict was based on a legally erroneous and prejudicial charge which precluded the jury from properly determining the issues. In its opinion, the Court of Appeals unanimously agreed that reversible error had been committed by the District Court in its charge but by a 2-1 majority reasoned that the case properly had been submitted to a jury for determination. In a dissenting opinion, Judge Hincks held this to be a case which, as a matter of law, was for the Court and not the jury.

ARGUMENT

POINT I

The present posture of the case is such that this Court should review the narrow question presented.

Domestic insurance controversies are patently interstate commerce, as has been unequivocally held by this Court in *U. S.* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533. Inasmuch as petitioners are alien non-admitted insurers, who underwrote the risk abroad, there can be no conclusion other than this is a matter involving foreign commerce. At the Mid-Year Meeting of the National Association of Insurance Commissioners, held a few days ago (Dec. 4-8, 1961), T. Nelson Parker presided. He is

the President and also the Virginia Insurance Commissioner. He said:

> "It is now estimated that the American insurance-buying public is purchasing from non-admitted insurers, insurance with premiums aggregating between $400,000,000 and $500,000,000. This is a very substantial volume of business."

In a field of this magnitude, petitioners submit that this Court has a legitimate interest, indeed a duty, to see that our federal courts determine the relationships between the parties in accordance with the highest American concepts of and interest in foreign trade. Is it consonant with such interests or our law to take a case such as that at bar, with all testimony provided by witnesses of respondent, and fail to give judgment as a matter of law? This is a pure contract case, to be determined on undisputed facts and quite unlike *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U. S. 527, where none of the considerations prompting the majority opinion can *possibly* exist because respondent put in all of the evidence. The case therefore is squarely within the reasoning of Justices Frankfurter and Harlan in that case.

The majority also comes to the astounding conclusion that "the New York Courts, likewise, have not applied one standard to one type of policy and another standard to a different type" (6b). While authority is perhaps unnecessary to conclude that one type of insurance risk is not the same as another and that different terms and standards may apply to one, although irrelevant to another, the full measure of such authority exists, particularly in New York.

In *Stecker* v. *American Home Fire Assur. Co.*, 299 N. Y. 1, 6, the New York Court of Appeals expressly recognizes that there is one rule on non-disclosure applicable to marine policies and another which governs the interpreta-

tion of inland marine contracts. In addition to the law on the point, petitioners appeal to the common experience of the Court as to whether one type of an insurance risk is like that of another, to be governed by the same standards and policy wordings. If all insurance was simply insurance, why does society need marine underwriters, inland marine underwriters, fidelity, surety, life and other specialized professionals? Patently, different terms are necessary for different risks, otherwise some risks are quite uninsurable.

The State of New York and the New York Court of Appeals have been foremost in recognizing the distinction between types of insurance. The legislature has by statute defined the permissible provisions of a fire policy and has promulgated a standard form. See New York Insurance Law, § 168. The legislature has also defined the permissible provisions for a liability contract (§ 167, New York Insurance Law). Not only in these two categories has the legislature recognized the different classes of insurance. The classes are broadly enumerated in New York Insurance Law, § 46. In that connection, it is noteworthy that Subsection 11 makes specific provision for "Animal Insurance." Unlike the classes mentioned above, New York has not seen fit to prescribe a standard form. Why the omission? Petitioners suggest that this Court consider whether there are those ultra hazardous forms of insurance for which even limited protection can only be procured on terms imposed by the insurer for his protection and voluntarily assumed by the assured. Judge Hincks recognizes this reality (14b-15b) and this Court might consider whether an unprecedented refusal to enforce the clear terms of a hazardous insurance contract can broadly injure the insuring public by depriving it of a market.

The New York Court of Appeals has also played a major role in the development of insurance law and in differentiating between classes of insurance. In no decision was this statement better evidenced than in the recent appeal

in *Woods Patchogue Corp* v. *Franklin Nat'l Ins. Co.*, 5 N. Y. 2d 479. In that case, the insurer issued a jewelers block policy insuring, *inter alia*, the peril of fire. The policy contained numerous conditions and warranties, some of which were breached. Plaintiff claimed it was not bound by such warranties and conditions because they were not a part of the standard statutory fire wording and the loss was occasioned by fire. Plaintiff had the authority of the Eighth Circuit in support of its position (*Vermes Credit Jewelry* v. *Fireman's Fund Ins. Co.*, 185 F. 2d 142, later overturned by statute). The New York Court of Appeals held that jewelers block was a new and totally different kind of insurance and, construing 46 of the Insurance Law, which delineates permissible types of insurance, stated that it was to be enforced according to its terms. In the face of this precedent, is there any justification for the majority in this case to surmise that the Court of Appeals would not do likewise, when dealing with livestock insurance, surely an ultra-hazardous class? Is it reasonable for the majority to speculate that the New York Court of Appeals might take such an unprecedented stand, contrary to the philosophy of prior rulings, when all of the sister states who have dealt with livestock insurance have uniformly enforced the contracts according to their terms. This is conceded by all three Circuit Judges who heard the case (5b, 15b-16b).

The majority holding that this case should be submitted to a jury is entirely inconsistent with the law of New York and the majority ignores a unanimous decision of its own Court on this point. Judge Learned Hand said in *Zanderer* v. *Cont. Cas. Co.*, 140 F. 2d 211, 214:

> "Apparently it is true in New York, if all the facts are undisputed, that the Court will not leave to a jury, but will decide for itself, whether the delay has been 'unreasonable'. Bennett v. Lycoming County Mutual Ins. Co., 67 N. Y. 274; Carpenter v. German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; * * *."

That New York continues to follow such rule is evidenced by the decision of Judge Greenberg in *Public Service Mutual Ins. Co.* v. *Lutz* (N.Y.L.J. 13 Oct. 1961 i.e. two days after rendition of the decision in the case at bar, not otherwise reported). A copy of the decision is annexed hereto (24b).

If, on the other hand, the question of whether the case is one for the jury is not a question of New York law, this Court's duty with respect to the practice of federal courts dictates a review. Judge Learned Hand held that it was not a question of New York law in *Zanderer* v. *Cont. Cas. Co.*, 140 F. 2d 211, 214 and the majority in the matter at bar said:

> "Although we may not be bound by the law of New York on this issue, inasmuch as the question is not one of substantive law, • • • we hold that submission of the issue to the jury was not improper • • •."

Burd v. *Blue Ridge Rural Electric Cooperative*, 356 U. S. 527, is cited as the authority. Petitioners submit that *Burd* is authority for the proposition that this Court should grant certiorari here; that none of the factors dictating a jury trial in *Burd*, or any other such factor, is present in the case at bar. Of necessity, the rule advocated by Justices Frankfurter and Harlan in *Burd* should obtain in this contract case where respondent supplied *all* of the evidence and petitioners *none*.

POINT II

Under any sound canon of legal construction known to American jurisprudence, petitioners are entitled to judgment as a matter of law in this case.

The majority below concede that the Courts "should not rewrite the insurance contract entered into by the parties" (12b). This is the law of this Court and the

law of the land. See *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 463 and for New York see *Johnson* v. *Travelers Ins. Co.*, 269 N. Y. 401, 405, where the Court held:

> "Unless we are prepared to adopt the theory of the cynic that language was invented for the purpose of concealing thought, we have no right to disregard the clear provisions which defendant inserted in the policy and plaintiff accepted."

In *Neas* v. *Home F. & M. Co.*, 135 F. Supp. 205, 207, the Court stated as follows:

> "It is as true of insurance policies as of other contracts that the rights of the parties are to be determined from the contract and that the Courts may not in the guise of strict construction against the insurer, make what amounts to a new contract of the parties."

In *Abrams* v. *Great American Ins. Co.*, 269 N. Y. 90, 92 (1935), the Court held as follows:

> "The language employed in the contract of insurance must be given its ordinary meaning, such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it."

Chief Judge Cardozo, speaking for the Court of Appeals in *Sun Printing & Publishing Ass'n.* v. *Remington Paper & Power Co.*, 235 N. Y. 338, 346, stated as follows:

> "We are not at liberty to revise while professing to construe."

The meaning of the words "immediate notice" as used in this contract is such "as common thought and common speech would now imagine and describe it". (*Van Vechten* v. *American Eagle Fire Ins. Co.*, 239 N. Y. 303, 307 (1925).)

Patently, derogation to a jury of a question of pure

law is but an ingenious mode of avoiding the law, if the jury simply favors the assured.

The Court of Appeals concedes that the states which have previously considered livestock policies are not in accord with its ruling. Indeed, the precedents are unanimously the other way. See *Hooper* v. *Kaskaskia Live Stock Insurance Co.*, 201 Ill. App. 167; *VanValkenburg* v. *Granite Live Stock Insurance Co.*, 205 Ill. App. 28; *Hartford Live Stock Insurance Co.* v. *Henning*, 206 Ky. 9, 266 S. W. 912; *Green Bros.* v. *Northwestern Live Stock Insurance Co.*, 87 Iowa 358, 54 N. W. 349 and *Hough* v. *Kaskaskia Live Stock Insurance Co.*, 230 Ill. App. 341. In each of these cases, the assured was precluded from recovery because of the delay in reporting the injury or sickness of which the animal died.

The law was never stated better than in *Hough* wherein it was held, page 348:

> "The evidence discloses that appellee was undertaking to determine for himself the propriety of giving appellant notice of the horse's sickness and having determined that it was not necessary so to do, he did not notify appellant until June 12, when according to the testimony of Dr. Spencer the disease then had such a hold on the horse as to threaten its death. It was not for appellee to determine the seriousness of the sickness. Under the provisions of the policy it was his duty to notify the company, *unless he was willing to undertake to carry his own insurance so far as that sickness was concerned.*" (Emphasis ours.)

There is no precedent in New York which even intimates a contrary result on a clause such as the one here involved. The Circuit Court has overlooked *Hanna* v. *Commercial Travelers Mut. Accident Ass'n.*, 197 N.Y.S. 396, 397, aff'd 236 N. Y. 571 and *Whiteside* v. *North American Accident Ins. Co.*, 200 N. Y. 320, 322, 323, 324, which place New York in accord with the rationale of its sister states.

The notice clauses of the policies in issue require notice prior to loss and are coupled with a provision for *release* of the insurers and voidance of the claim. In the face of such a condition, the reliance of the majority on *Greenwich Bank* v. *Hartford Fire Ins. Co.*, 250 N. Y. 116, is totally misplaced.

For evidence of this reliance see majority opinion (8b). The New York Court of Appeals in that case was dealing with a provision requiring immediate notice. However, it said:

> "When we consider that this is not made one of the conditions which voids the policy, but is linked up to those provisions relating to requirements after the loss, we should give this policy a reasonable interpretation, and a fairly liberal construction."

In the case at bar, as Judge Hincks has noted, we are dealing with a requirement *prior* to loss and also a condition which voids the insurances. It is submitted that *Greenwich Bank* is pregnant with the implication that the New York Court of Appeals would not have considered that it had any latitude, if dealing with a clause such as that which is before this Court. All other cases cited by the majority contain notice clauses which require notice "as soon as practicable" and none contain a provision for voidance of the policy and release of the insurers in the event of non-compliance, as does the clause under consideration. *Melcher* v. *Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, is the one exception to this statement. That was a case involving a third-party liability policy for bodily injury and is, we submit, completely inapposite, if for no other reason than that the assured had no cause to believe that there was any bodily injury. It would seem irrational to take the same position with a horse which X-rays disclose has a broken leg.

The knowledge of respondent, her trainer, the manager of the farm to which her colt was dispatched to recuperate

and that of her veterinarian is imputed to her, for the period of over seven months incepting in January 1957 and ending upon September 4, 1957, the day notice was given to petitioners. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 264. Cf. *Melcher* v. *Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 123 N. E. 81. For example, during that period her trainer learned of the injury which eventually resulted in destruction on at least three different occasions: January, April, and July 1957. On none were petitioners given "immediate notice by telephone or telegraph" as stipulated in the policies. No notice at all was given until September 4, 1957.

Petitioners do not advocate that this or any other Court be other than reasonable in deciding any case. They respectfully suggest that any result other than judgment on their behalf is unreasonable. While they submit that consideration of what is "reasonable" is scarcely germane in a matter so clear, the concluding lines of Judge Hincks' dissent dictate the result if "reasonableness" be the criterion. He said:

> "In my opinion, in the case here the reasonableness of the notice was a question of law for the court under that line of cases which stem from Chief Judge Cardozo's opinion in *Rushing* v. *Commercial Cas. Ins. Co.*, 251 N. Y. 302, 304, 167 N. E. 450,[2] holding that notices

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[2] "The *Deso* opinion, *supra*, in the following passage reaffirms and applies the *Rushing* doctrine:

'Thus in the *Kushing* case, supra, 251 N. Y. at page 304, 167 N. E. at page 451, Cardozo, Ch. J., stated that as a matter of law, "In the absence of explanation or excuse, a notice of an accident withheld for 22 days is not the immediate notice called for by the policy." In an earlier case this court, having found no mitigating circumstances, held that a delay of 10 days was unreasonable as a matter of law (*Haas Tobacco Co.* v. *American Fidelity Co.*, 226 N. Y. 343, 123 N. E. 755, 13 A.L.R. 132; see, also, *Quinlan* v. *Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31 [33 days]; *Kerna* v. *United States Cas. Co.*, 228 App. Div. 108, 239 N. Y. S. 196, affirmed 250 N. Y. 537, 177 N. E. 130 [26 days]; *Vanderbilt* v. *Indemnity Ins. Co. of North America*, supra [28 days]).'"

were not 'immediate' when given after delays far shorter than that occurring here. I think that even if 'immediate' notice was *reasonable* notice under applicable New York law, the court should have ruled as a matter of law that such notice was not given."

The delay here was for a period *in excess of seven months.*

CONCLUSION

For the reasons set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK A. BULL,
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Office and P. O. Address,
27 William Street,
New York 5, N. Y.

MENDES & MOUNT,
JOHN J. KILLEA,
JOSEPH P. SULLIVAN,
Of Counsel.

APPENDIX

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 49-50—October Term, 1960.

(Argued October 7, 1960 Decided October 11, 1961.)

Docket Nos. 26180-26181

ADELE L. RAND,

Plaintiff-Appellee,

—v.—

UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING LLOYD'S POLICY NO. D B 6/234,

Defendants-Appellants.

ADELE L. RAND,

Plaintiff-Appellee,

—v.—

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,

Defendants-Appellants.

Before:

HINCKS, WATERMAN and MOORE,

Circuit Judges.

Opinion of United States Court of Appeals, Second Circuit.

Defendants appeal from judgments by the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *Judge*, entered upon verdicts in favor of plaintiff in actions brought on certain policies of livestock coverage. Reversed and remanded for new trials.

KISSAM & HALPIN (Leo T. Kissam, Edmond K. Leach, of counsel), New York City, *for Plaintiff-Appellee.*

MENDES & MOUNT (Joseph P. Sullivan, Benjamin E. Haller, John J. Killea, of counsel), New York City, *for Defendants-Appellants.*

WATERMAN, *Circuit Judge*:

In these two cases, Adele Rand, a citizen of the State of New Mexico, sues the defendants, British insurers, on two policies of livestock mortality insurance indemnifying her against loss through death of her race horse, Tom F., Jr. The issues in the two cases are identical except for the amounts of insurance provided for in the two policies, and therefore the two suits were consolidated for trial and remain so upon appeal.

Mrs. Rand purchased Tom F., Jr., then a weanling, in January 1956, for the sum of $38,000. On November 2, 1956, a veterinarian, Arthur H. Davidson, examined the yearling colt at the training farm of one Ward in Kentucky and found him to be sound and normal in all respects. The defendants then issued the policies sued upon, covering the period from November 3, 1956 to November 3, 1957, in the aggregate amount of $38,000. Among the conditions of the policies was the following:

> "In event of any illness, lameness, accident, injury or physical disability whatsoever of an insured animal

> the Assured shall immediately give notice [to the insurers' agent] • • • by telephone or telegram • • • The Assured's failure to report the illness, lameness, accident, injury or physical disability as above provided • • • shall render Assured's claim null and void and release Insurers [Underwriters] • • • from all liability in connection therewith."

In January 1957, one W. W. Stephens, Mrs. Rand's trainer, noticed a "weakness" or "slight catch" in the colt's hindquarters. An X-ray taken January 29, 1957 indicated a fracture of the fibula of the left hind leg, a condition testified to as being "very common" in horses of Tom F., Jr.'s age. Soon the horse was walking normally again, but in early April, while at Belmont Park, New York, for racing, Stephens noticed a recurrence of the "catch," and the horse, now a two-year-old, was shipped from Belmont back to the Ward farm in Kentucky where he could get "a good long rest" and could be looked at by Dr. Davidson. Between April and July Dr. Davidson noted that Tom F., Jr. improved but then his condition "remained static." In late July Stephens was in Kentucky for yearling sales, and was told by Ward that the horse had improved to a point and "was kind of holding his own but wasn't improving as much as we would like for him to have." Stephens became concerned, because "we gave a lot of money for him."

In the final days of August the fatal illness of his father again took Stephens to Kentucky. He was then told by Dr. Davidson that Tom F., Jr. was getting worse all the time and that the insurance people should be notified. Stephens then telephoned Mrs. Rand or her husband at Saratoga, N. Y., informed them of the situation, and told them to notify the insurers. The Rands, on September 4, did so. On or about October 30 the defendants denied liability on their policies on the sole ground that Mrs. Rand

had failed to comply with the notice conditions contained therein. On November 2, 1957 (the day before the policies were to expire) Dr. Davidson destroyed the horse for humane reasons.

At the close of plaintiff's case and again at the close of all the evidence, the defendants moved for directed verdicts. Decision thereon was reserved. The consolidated case was submitted to the jury, the defendants taking exceptions to a portion of the judge's charge. The jury returned verdicts for plaintiff, defendants renewed their motion for directed verdicts, and further moved to set the verdicts aside. All of defendants' motions were denied, judgments were entered on the verdicts, and the defendants appeal. Appellants claim that, as a matter of law, plaintiffs failed to "immediately give notice * * * by telephone or telegram" as required by the policies, and therefore, that there was no issue of fact to go to the jury. Moreover, appellants argue that even if it were proper for the jury to determine whether the plaintiff under the circumstances "immediately gave notice" there was a portion of the court's charge to the jury, properly objected to by defendants, that was prejudicially erroneous. It is our view that the trial judge correctly submitted the question of whether the notice the plaintiffs gave complied with the notice provisions in the policies; but we agree with appellants that the charge was prejudicial to them. Therefore, we reverse the judgments below and remand the cases for a new trial.

This is a diversity suit and so the susbtantive rights and liabilities of the parties are governed by New York law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); see *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 99 (1954); *Zagg* v. *Penn. Mutual Life Insurance Company*, 276 F. 2d 861 (2 Cir. 1960). The New York courts have construed the phrase "give immediate notice" when it has appeared in insurance policies setting forth requirements that a notice of a

loss or of a changed condition must quickly be relayed to the insurer. We are required to follow that construction unless there is a justification for not doing so, and we do not discover any justifiable reason for departing from the New York precedents.

When interpreting "immediate notice" the New York courts have consistently applied a so-called rule of "reasonableness" by which to define the time when the insured must give the insurer a notice of a loss or of a changed condition (as an accident) if the contract of insurance is not to be made void for delayed notice. They have held that "immediate notice" means "notice within a reasonable time under all the circumstances." *Greenwich Bank v. Hartford Fire Ins. Co.*, 250 N. Y. 116 (1928); *Melcher v. Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 123 N. E. 81 (1919); *Woolverton v. Fidelity & Casualty Co.*, 190 N. Y. 41 (1908); *Solomon v. Continental Fire Ins. Co.*, 160 N. Y. 595 (1899); *Matthews v. American Central Ins. Co.*, 154 N. Y. 449 (1897); *Reina v. United States Casualty Co.*, 239 N. Y. S. 196 (1st Dept. 1930); *Keegan v. Excess Ins. Co. of America*, 116 N. Y. S. 2d 687 (Sup. Ct. 1952).

Therefore, at the threshold of our consideration of whether the motions for the directed verdict should have been granted we must decide if here "immediately give notice" means "give reasonably immediate notice under the circumstances." We are unwilling to depart from New York's "reasonableness" rule and are unwilling to adopt a stricter standard of interpretation for federal courts to apply when adjudicating upon claims arising from livestock policies. We realize that there are jurisdictions outside of New York that strictly interpret the notice provisions in livestock policies. See *Hough v. Kaskaskia Live Stock Ins. Co.*, 230 Ill. App. 341 (1923); *Green Bros. v. Northwestern Live Stock Ins. Co.*, 87 Iowa 358, 54 N. W. 349 (1893). However, New York apparently applies a "reasonableness" standard when interpreting all insur-

ance notice clauses and, though the New York decisions are found in suits arising out of actions brought upon fire and accident indemnity policies, there is no reason why the same standard should not apply to livestock policies. In *Zanderer* v. *Continental Cas. Co.*, 140 F. 2d 211 (2 Cir. 1944), we applied New York's rule of reasonableness to an automobile liability policy, and in reaching that result we relied on New York cases involving both fire insurance and liability insurance undistinguishably.

The New York courts, likewise, have not applied one standard to one type of policy and another standard to a different type. In *Solomon* v. *Continental Fire Ins. Co.*, 160 N. Y. 595 (1899), involving fire surance, the Court of Appeals stated, "immediate notice is notice within a reasonable time." In *Melcher* v. *Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 56, 123 N. E. 81 (1919), it stated that "it is not every trivial mishap or occurrence that the assured under such a policy of liability insurance must regard as an accident of which notice should be given immediately to the insurance company, even though it may prove afterwards to result in serious injury." In *Reina* v. *United States Casualty Co.*, 239 N. Y. S. 196, 197 (1st Dept. 1930), the Appellate Division of the New York Supreme Court, First Department, declared that an " 'Immediate notice,' under this clause, is notice within a reasonable time under all the circumstances." (Citing cases.) And in *Deso* v. *London & Lancashire Indem. Co.*, 3 N. Y. 2d 127, 130, 143 N. E. 2d 889 (1957), the Court of Appeals said that "the *Melcher* case is authority for the proposition that ignorance of the fact that injury has resulted from an accident may excuse a delay in giving notice."

Similarly, a textbook writer finds no distinction justifying a different interpretation of the phrase in different types and kinds of policies. In his *Handbook on the Law of Insurance* (3d ed. 1951), Vance points out at p. 893:

"Notice of loss is held to be 'immediate,' within the requirement of the standard policy, when it is given as soon after the fire as is reasonably possible under existing circumstances, in the exercise of due diligence." And at p. 1001, in the chapter on liability insurance, he states: "The assured is usually required by the terms of the policy to give immediate notice or notice as soon as practicable to the liability insurer of any accident which may result in a claim under the policy. These and like expressions will be construed to mean notice within a reasonable time, and not necessarily notice immediately after the accident."[1]

There are distinct practical advantages in applying the New York Standard of "reasonableness" to the "immediate notice" phrase. Strict interpretation could result in permitting no leeway for the exercise of judgment in the light of common experience. The New York courts are committed to the doctrine that the "reasonableness" standard is just to insured and insurer, and we believe that the New York courts would interpret the "immediate notice" required by these policies to mean "reasonably immediate notice under the circumstances."

There now remains the question of whether the decision as to the reasonableness of the notice that was given here should have been decided by the court or was properly submitted to the jury. Although we may not be bound by the law of New York on this issue, inasmuch as the question is not one of substantive law, *Zaederer* v. *Continental Cas. Co.*, 140 F. 2d 211, 214, we hold that submission of the issue to the jury was not improper under the circumstances present here. Cf. *Byrd* v. *Blue Ridge Rural Electric Co-operative*, 356 U. S. 525 (1958).

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[1] For further cases demonstrating the validity of the New York position see discussion in 45 C. J. S. § 1054; Notes in 70 A. L. R. p. 53, and 123 A. L. R. p. 959; and see discussion in Vance, *Handbook on the Law of Insurance*, p. 895.

In *Greenwich Bank* v. *Hartford Fire Ins. Co.*, 250 N. Y. 116, at 131, the Court of Appeals summarized as follows: "The rule has been repeatedly stated that a reasonable time, when the facts are undisputed and different inferences cannot reasonably be drawn from the facts, is a question of law." (Citing cases.) "This is one of those general rules, however, which is sometimes difficult of application, and results in the question being left to a jury when it is near the border line. Carpenter v. German American Ins. Co., 135 N. Y. 298, 303, 31 N. E. 1015." See *Empire State Surety Co.* v. *Northwest Lumber Co.*, 203 Fed. 417 (9 Cir. 1913). Therefore, in New York, when dissimilar inferences may be drawn from undisputed facts, or when the facts are in dispute, "reasonableness" is a jury question. "It is also well settled that the reasonableness of a delay, where mitigating circumstances such as absence from the State or lack of knowledge of the occurrence or its seriousness are offered as an excuse, is usually for the jury." *Deso* v. *London & Lancashire Indem. Co.*, 3 N. Y. 2d 127, 129, 143 N. E. 2d 889 (1957). See *Gluck* v. *London & Lancashire Indem. Co. of America*, 2 N. Y. 2d 953; *West Va. Pulp & Paper Co.* v. *Merchants Mut. Ins. Co.*, 201 N. Y. S. 2d 314 (3d Dept. 1960); *Zurich Ins. Co.* v. *Maritez*, 201 N. Y. S. 2d 810 (Sup. Ct. 1960).

The basic facts relative to the health of Tom F., Jr. that were presented at the trial squarely put in issue the question of whether the proverbial "reasonably prudent man" would have given notice to the insurers of his condition under all the circumstances at any earlier date than September 4, 1957. Certainly the facts are subject to more than one interpretive inference. Under such circumstances the question was properly one for the jury. See *American Mutual Liability Ins. Co.* v. *McFarlane Fire Prevention Corp.*, 162 F. Supp. 915 (E. D. N. Y. 1958). Therefore the motions for directed verdicts were properly denied.

We turn now to a consideration of whether the cases should be remanded for a new trial because of the claim that a portion of the charge was prejudicial to the defendants, and, if prejudicial to them, whether the defendants properly saved the question for review.

Rule 51 of the Federal Rules of Civil Procedure states that:

> "• • • No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. • • •"

Thus in order for us to review a portion of the trial court's charge to the jury, we must first determine whether a proper objection was taken pursuant to Rule 51. The purpose of this rule, as we stated in *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253, 259 (2 Cir. 1956):

> "• • • is to expedite the administration of justice by insuring that the trial judge is informed of possible errors so that he may have an opportunity to reconsider his charge, and, if necessary, to correct it."

The trial judge charged the jury that:

> "What factors should you consider in determining whether, under these facts, the Rands gave notice of the *serious ailment* to the insurance companies within a reasonable time under all the circumstances which was required by these insurance policies? One of the factors, of course, is when the Rands knew or should have been reasonably expected to know of such condition because, until such knowledge came to their attention, or should reasonably have come to their attention.

> they could not have been expected or required to give such notice. There might well be a condition of the horse, for example, which nobody would know about and which only became apparent at point X and, until such condition was known to the insured, of course no notice is required." (Emphasis supplied.)

After the charge had been completed and before the jury had retired defendants' counsel stated:

> "Your Honor, may we note one exception? You explained the factors that the jury was to take into consideration. The two factors which you stated were, one, when the Rands knew or would be reasonably expected to know of a condition and, two, the condition was to be of a certain type."

There was then discussion off the record, and the court then stated:

> "The defendant takes exception to a sentence which reads that there might well be a condition, et cetera, about point X.
>
> "The defendant may have an exception if it wishes. However, in my view, the sentence, read in context, makes it entirely clear to the jury *that the ailment we are talking about is the type of ailment that was defined by the Court* and that notice to the insured includes, of course, notice to the insured's agent, as I repeated three or four times, and I will not charge any further on that." (Emphasis supplied.)

From this language it is evident that the court was referring to his statement to the jury that the first question they were to decide was: "When was the horse found to

be suffering from a serious ailment?" and to that portion of his charge reading as follows:

> "As you will recall from my reading of the clause, it refers to any illness, lameness, accident, injury or physical disability whatsoever of an insured animal. Now, if this were to be taken literally, any indisposition of the animal, no matter how slight or trivial, would require notice to be given to the insurance company. However, the law does not interpret this language literally. It is not construed that way. If, for example, take almost a ridiculous example, an animal gets a small cut or a scratch or a bruise, plainly the owner is not required to give notice to the insurance company under this clause, and this is so even if, because of unforeseen circumstances, the incident, mishap or occurrence may turn out to be much more serious than one would reasonably expect at the time. You don't have to report to the insurance company every time the horse sneezes.
>
> "On the other hand, this clause in the policy has meaning and is part of the contract between the parties. As these terms are used in the policy they mean an ailment—and I use an ailment in essence to cover all of them—of such a character as to affect the general soundness and health of the animal and not a mere temporary indisposition which does not tend to undermine or weaken the animal's constitution.

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[2] (Our footnote)

The provision in the policies that reads

> "In the event of any illness, lameness, accident, injury or physical disability whatsoever of an assured animal, the assured shall immediately give notice to the insurer or its agent by telephone or telegram, who will instruct the veterinarian surgeon on insurer's behalf if deemed necessary."

> "This does not mean that the illness, accident or mishap must be such as would necessarily lead to the death of the animal. As I have pointed out, it must be of sufficient seriousness as would lead to the reasonable expectation that it would seriously affect the animal's health or constitution."

The colloquy between the court and defendants' counsel at the time the exception was taken demonstrates that counsel was objecting to the instruction that the insured's duty to give notice arose only when the horse began to suffer from a "serious ailment." The colloquy also demonstrates that the court understood counsel's position. Hence we hold that, despite appellee's claim to the contrary, appellants' exception to the charge as given was properly preserved.

The court overfavored the plaintiff by instructing the jury to ascertain the time when the horse was found to be suffering from a *serious* ailment and by constantly reiterating that a showing that the horse's health was seriously affected was a prerequisite to the giving of immediate notice of the horse's condition. It is not the insured's opinion of what is or is not a serious ailment that determines when notice must be given under the policy, for the policy says nothing about serious or non-serious lamenesses. Despite the existence of the "reasonableness" rule as a matter of substantive law in New York, the courts in applying it should not rewrite the insurance contract entered into by the parties. All the circumstances of the situation that gave rise to the suits and that tended to support defenses to them, not merely the one disputed circumstance of the time of plaintiff's first knowledge of the seriousness of the animal's ailment, were before the jury; and the jury question was whether, under all these circumstances, the notice the plaintiff gave was a reasonable compliance with the notice requirements of the policies. For instance, the nature of the animal's initial ailment and the undisputed

facts with reference to the animal's subsequent history, as well as the nature of the insurance policies and the language of the insuring agreements therein contained, bore upon this question. The stress the court placed upon seriousness of ailment may well have influenced the jury deliberations to the prejudice of the defendants.

Reversed and remanded for a new trial.

HINCKS, *Circuit Judge* (concurring in part and dissenting in part):

I agree with my brothers that the plaintiff's judgments below should be reversed for error in the charge. But I dissent from their holding that it was proper to submit to the jury the question whether the notice provision of the policies had been complied with. I would hold that it was error to deny the defendants' motions for directed verdicts and to set aside the jury's verdicts. Accordingly, I would reverse with a direction to enter judgments for the defendants.

Without deciding whether Ward or Davidson were Mrs. Rand's agents whose knowledge would be imputable to her, it is clear that Stephens, the trainer, was such an agent, and that Mrs. Rand is chargeable with the knowledge Stephens acquired while acting within the scope of his authority on her behalf. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 264. Cf. *Melcher* v. *Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 123 N. E. 81. While so acting, Stephens learned of the injury which eventually resulted in Tom F. Jr.'s destruction, on at least three different occasions: January, April, and July 1957. On none of these occasions were the insurers given "immediate" notice "by telephone or telegraph." No notice at all was given until September 4th. If the condition clause of the policies means what it says, no question of

fact existed for the jury to decide, and the district court erred in denying defendants' motion for a directed verdict. The questions before us, then, are these. Under the law of New York, is this clause to be enforced according to its terms, or is a so-called rule of "reasonableness" to be injected? If the latter interpretation be adopted was the question whether "immediate notice" was given properly submitted to the jury?

The majority opinion rests principally upon cases holding that "immediate notice" means "notice within a reasonable time." But these cases are not determinative of the New York law applicable to a case such as this which turns upon a policy of livestock mortality insurance. *Greenwich Bank* v. *Hartford Fire Ins. Co.*, 250 N. Y. 116, 164 N. E. 876, was a fire insurance case. *Deso* v. *London & Lancashire Indemnity Co.*, 3 N. Y. 2d 127, 143 N. E. 2d 889; *Marcus* v. *London & Lancashire Indemnity Co.*, 6 A. D. 2d 702, aff'd 5 N. Y. 2d 961, 157 N. E. 2d 714; *Gluck* v. *London & Lancashire Indemnity Co.*, 2 N. Y. 2d 953, 142 N. E. 2d 423; and *Melcher* v. *Ocean Accident & Guarantee Corp.*, 226 N. Y. 51, 123 N. E. 81, all involved policies of third-party liability insurance and all except *Melcher* contained clauses providing for notice "as soon as practicable."

The present case is in what we once called, in a different context, the "zone in which federal courts must do their best to guess what the highest state court will do." *Cooper* v. *American Airlines, Inc.*, 2 Cir., 149 F. 2d 335 (1945). So doing, I think that the New York Court of Appeals would hold that the notice provisions in these mortality policies should be strictly enforced and that that court, made up now, as in 1945, when *Cooper* was decided, of "reasonable intelligent lawyers * * * fully conversant with New York 'jurisprudence,'" *Cooper, supra*, would not regard livestock mortality insurance policies as contracts entered into by parties of unconscionably unequal bargaining power and would feel that this clause is part of the

price paid by owners to insurers such as the present defendants. If such a clause is to be read out of the policies, the only result will be higher premiums or greater difficulty in obtaining this type of coverage. I think that the New York court would regard the policy reference to *notice by telephone or telegraph* as pointing up the intended meaning of "immediate notice" in these policies. Especially is this so as the requirement of notice of injury and illness in livestock mortality insurance policies has an importance not generally existing elsewhere in the field of insurance. For immediate notice of the disability under a mortality policy may enable the underwriter to take steps to prevent the death upon which the policy is conditioned. Indeed, in these very policies there was a provision that "the Assured shall * * * allow removal [of the insured animal] for treatment, if required by the Underwriters." Plainly this option was one for the underwriter—not the assured.[1] None of the New York cases *cited in the majority opinion* was addressed to a notice requirement in such policies as these.

The weight of authority elsewhere supports the views I have attempted to articulate. I think a New York court

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[1] Conditions 9 and 10, respectively, of the two policies contained options for cancellation, one in behalf of the Assured and the other in behalf of the insurers. The insurers' option read as follows:

> "This Certificate may also be cancelled, with or without the return or tender of the unearned premium, by the Insurers or by Thoroughbred Service Corp. [insurers' American agent] in their behalf, by delivering to the Assured or by sending to the Assured by mail, registered or unregistered, at the Assured's address as shown hereon, not less than five days' written notice stating when the cancellation shall be effective, and in such case the Insurers shall refund the paid premium less the earned portion thereof on demand."

It will be observed that such an option lends further emphasis to the importance of strict compliance with a requirement of *immediate* notice by the assured of "any illness, lameness, etc." in a livestock mortality policy.

would regard these decisions in sister states as representing the American law of livestock insurance and would adopt them. In *Hough* v. *Kaskaskia Live Stock Ins. Co.*, 230 Ill. App. 341 (1923), the court held:

> "It was not for appellee to determine the seriousness of the sickness. Under the provisions of the policy it was his duty to notify the company, unless he was willing to undertake to carry his own insurance so far as that sickness was concerned."

And in *Green Bros.* v. *Northwestern Live Stock Ins. Co.*, 87 Iowa 358, 54 N. W. 349 (1893), which involved an animal that became ill on the 14th, then seemed to recover, and died on the 22nd, a charge that the illness must be such as to indicate to a reasonable man that the animal is in danger was held erroneous and a judgment in favor of the insured based on a jury verdict was overturned. Acting "vicariously" for the New York courts, then, see *Dale System, Inc.* v. *Time, Inc.*, D. C. D. Conn., 116 F. Supp. 527, I would hold that under New York law the court below erred in reading a rule of reasonableness into the notice condition of these livestock policies. It should have enforced the provision according to its plain meaning.

But even if the New York court would interpret the "immediate" notice required by these policies to mean "reasonably immediate" or, as the majority opinion suggests, such seasonable notice as the "proverbial 'reasonably prudent man' would have given," there still was a failure of the required notice.

In *Deso, supra*, it was said: "It is also well settled that the reasonableness of a delay in giving notice, where mitigating circumstances such as absence from the State or lack of knowledge of the occurrence or its seriousness are offered as an excuse, is usually one for the jury." But here there was neither pleading nor evidence of any miti-

gating circumstances. As pointed out above the plaintiff, through Stephens her trainer, knew as early as January and in April that her valuable and heavily insured race horse had suffered a lameness. In July, she learned that the initial improvement of this lameness had ceased. Yet she gave no notice until September. These facts place the instant case within the *Deso* holding that "an unexcused delay of that length [51 days] constitutes a breach of condition as a matter of law." The case here should be remanded for a dismissal as was the *Deso* case.

The *Melcher* and *Gluck* cases, also cited in the majority opinion, are distinguishable from the instant case for the same reasons that they were expressly distinguished in the *Deso* opinion. In *Melcher*, there was evidence that the assured was without knowledge of any bodily injury which could result in a claim against the assured. Here, the plaintiff's own agent testified to contemporaneous knowledge of the injury or lameness. Hence here there was no basis for lack of knowledge as an excuse for the delay. In *Gluck*, the assured's confusion as to the coverage of the policy was advanced as an excuse for the delay. No such factor is present here. In *Greenwich Bank*, the court was concerned with an "immediate notice" of loss clause in a fire insurance policy. The court held that because this clause "is linked up to those provisions relating to requirements after the loss, we should give this policy a reasonable interpretation, and a fairly liberal construction. Such is the law." In the instant case we are concerned with a requirement *preceding* the loss and hence not within the *Greenwich Bank* doctrine.

In my opinion, in the case here the reasonableness of the notice was a question of law for the court under that line of cases which stem from Chief Judge Cardozo's opinion in *Rushing* v. *Commercial Cas. Ins. Co.*, 251 N. Y. 302, 304,

167 N. E. 450,[2] holding that notices were not "immediate" when given after delays far shorter than that occurring here. I think that even if "immediate" notice was *reasonable* notice under applicable New York law, the court should have ruled as a matter of law that such notice was not given.

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[2] The *Deso* opinion, *supra*, in the following passage reaffirms and applies the *Kushing* doctrine:

> "Thus in the *Kushing* case, *supra*, 251 N. Y. at page 304, 167 N. E. at page 451, Cardozo, Ch. J., stated that as a matter of law, 'In the absence of explanation or excuse, a notice of an accident withheld for 22 days is not the immediate notice called for by the policy.' In an earlier case this court, having found no mitigating circumstances, held that a delay of 10 days was unreasonable as a matter of law (*Haas Tobacco Co.* v. *American Fidelity Co.*, 226 N. Y. 343, 123 N. E. 755, 13 A. L. R. 132; see, also, *Quinlan* v. *Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31 [33 days]; *Reina* v. *United States Cas. Co.*, 228 App. Div. 108, 239 N. Y. S. 196, affirmed 256 N. Y. 537, 177 N. E. 130 [26 days]; *Vanderbilt* v. *Indemnity Ins. Co. of North America*, *supra* [28 days])."

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of October one thousand nine hundred and sixty-one.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

ADELL L. RAND,

Plaintiff-Appellee,

v.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE CO., LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of October one thousand nine hundred and sixty-one.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

ADELE L. RAND,
Plaintiff-Appellee,

v.

Underwriters at LLOYD'S, LONDON, subscribing Lloyd's Policy No. DB6 234,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

Denial of Petition for Rehearing.

Petition denied.

Judge Hincks, dissenting.

SRW

LPM

USCJJ.

November 9, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed November 9, 1961

A. DANIEL FUSARO, Clerk

Order Denying Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of November, one thousand nine hundred and sixty-one.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
HON. PAUL R. HAYS,
Circuit Judges.

ADELE L. RAND,
Plaintiff-Respondent,

v.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,
Defendants-Petitioners.

A petition for a rehearing in banc having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of November, one thousand nine hundred and sixty-one.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

ADELE L. RAND,
Plaintiff-Respondent,

v.

Underwriters at LLOYD'S, LONDON Subscribing Lloyd's Policy No. DB 6/234,
Defendants-Petitioners.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Copy of Decision in *Public Service Mutual Ins. Co.* v. *Lutz*, Appearing in New York Law Journal, October 13, 1961.

By Mr. Justice Greenberg.

Public Service Mutual Ins. Co., v. Lutz—The precise issue presented in this declaratory judgment action is whether there is sufficient proof of the defendants' noncompliance with condition 9 of the policy issued by plaintiff, wherein the defendants are the named insured, requiring written notice to the company or its agents of an accident "* * * as soon as practicable." On July 18, 1958, a guest at defendants' hotel was involved in an accident. It is claimed that this guest advised one of the defendants that he had received only a scratch and that the incident should be overlooked. Subsequently, in February, 1959, this guest telephoned one of the defendants and informed him that his knee condition was worse, causing him to lose time from his employment. Finally, in May, 1959, defendants received a claim letter from an attorney representing this guest. The letter was forwarded to defendants' insurance broker. It is this court's opinion that these circumstances constitute an unreasonable and unexcused delay of notice, as required by condition 9 of the policy. Such untimeliness is a breach of said condition and vitiates coverage (see Deso v. London & Lancashire Indem. Co., 3 N. Y. 2d 127). The fact that the guest advised the defendants to forget the matter did not absolve them completely of their responsibility to notify the plaintiff of the occurrence. Even if the initial delay is excused, in light of the guest's gratuitous remarks, no evidence is submitted to explain or justify defendants' total failure to comply with condition 9 of the policy after the guest spoke to them in February, 1959. The plaintiff is entitled to judgment as prayed for in the complaint. Findings of fact and conclusions of law were waived. This constitutes the decision of the court, pursuant to section 440 of the Civil Practice Act. Settle judgment.